Supreme Court, U.S.
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No. 91-1563

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

AIU INSURANCE COMPANY, AMERICAN FIDELITY COMPANY, AMERICAN HOME ASSURANCE COMPANY, BIRMINGHAM FIRE INSURANCE COMPANY OF PENNSYLVANIA, COMMERCE AND INDUSTRY INSURANCE COMPANY, GRANITE STATE INSURANCE COMPANY, INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA, NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA, NEW HAMPSHIRE INDEMNITY COMPANY, INC., and NEW HAMPSHIRE INSURANCE COMPANY,

Petitioners,

v.

SUPERINTENDENT, MAINE BUREAU OF INSURANCE,

Respondent.

On Petition for a Writ of Certiorari to the Maine Supreme Judicial Court

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PETITIONERS' REPLY BRIEF

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Respondent offers up a melange of reasons why petitioners' constitutional claims should continue to escape review. Each of these reasons is wrong.

The decision below cannot be squared with *Martin* v *Wilks*, 490 U.S. 755 (1989), on the ground that petitioners, unlike the firefighters in *Wilks*, were "in privity with a prior litigant." Respondent's Brief in Opposition ("Resp. Br.") at 15. "Privity is merely another way of saying that there is sufficient identity between parties to prior and subsequent suits for *res judicata* to apply." *Mezza* v. *General Battery Corp.*, 908 F.2d 1262, 1266 (5th Cir. 1990). Persons are in "privity" for claim preclusion purposes only when the litigating party has been authorized to represent the non-party's interests with respect to that claim. *Nevada* v. *United States*, 463 U.S. 110, 135 (1983) (citing Restatement (Second) of Judgments § 41). Where the litigating party has not been authorized to represent a non-party's interests with respect to a claim, the non-party is not bound. Restatement (Second) of Judgments § 42(1)(b). The National Council on Compensation Insurance ("NCCI") did represent petitioners' interests in its ultimately mooted attempt to enjoin Maine's insurance rate freeze, and was for that purpose in "privity" with petitioners. However, the word "privity" cannot alter the Maine Supreme Judicial Court's conclusion that NCCI was never authorized by anybody to "sue for damages on behalf of its members." *AIU Ins. Co.* v. *Superintendent*, 600 A.2d 1115, 1117-1118 (Me. 1991), App. B at 7a. As the lower court itself recognized, because NCCI did not and could not represent petitioners' individual interests in securing just compensation, the lower court's holding can be justified only if petitioners could be required to intervene in NCCI's injunctive action and present their individual damages claims.[1]

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[1] Failure to appreciate the distinction between injunctive claims, which associations may bring on behalf of their members, and damages claims, which they may not, also underlies respondent's mistaken reliance on "federal decisions" such as *Utah Power & Light Co.* v. *ICC*, 764 F.2d 865 (D.C. Cir. 1985). The D.C. Circuit, like other circuits, recognizes that associations cannot, consistent with due process, extinguish the individual rights of their members

Enactment of the Civil Rights Act of 1991 does not confirm that "the principle enunciated in *Wilks* can be altered by rule or legislation." Resp. Br. at 14. When Congress enacted this new law it carefully limited the binding effect of civil rights consent decrees, such as that in *Wilks*, to those non-parties "whose interests were adequately represented . . . ." Pub. L. No. 102-166, § 108, 105 Stat. 1071, 1076. Because the bedrock principle reiterated in *Wilks* is based upon the due process clause, neither Congress nor a state court should be allowed to flout that principle.[2]

Nor is the doctrine of administrative *res judicata* (Resp. Br. at 21) an "adequate and independent" ground for the Maine Supreme Judicial Court's decision. In the first place, the lower court did not invoke this ground; it merely observed that if NCCI had not represented petitioners in its challenge to the rate freeze law, then petitioners might not have been entitled to challenge that law in a subsequent damages action. *AIU Ins. Co.*, 600 A.2d at 1118, App. 7a. As noted above, NCCI did "represent" petitioners for the limited purpose of invalidating the rate freeze law and the rule orders issued under it. But that representation did not encompass and could not bar petitioners' damages claims. Second, under Restatement (Second) of Judgments § 83, which the Maine courts follow and upon which respondent relies, the *res judicata* effects of administrative determinations are "subject to the same exceptions and qualifications as a judgment of a court." Since general principles of *res judicata* cannot constitutionally be applied to bar petitioners' damages

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to damages. *See TRAC v. Allnet Communications Serv., Inc.*, 806 F.2d 1093, 1095-1097 (D.C. Cir. 1986).

[2] Petitioners raised their due process contention in a reply brief rather than in their opening brief before Maine's Supreme Court (Resp. Br. at 12-13 n.11) because the *res judicata* issue came before the court only when the respondent's 75-page opposing brief included a cross-appeal from the lower court's rejection of all of his affirmative defenses.

claims, neither may the principles of administrative *res judicata*.

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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